

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 5/2006 OF 27TH JANUARY.2006

BETWEEN

N. K. BROTHERS LIMITED (APPLICANT)

AND

NATIONAL SOCIAL SECURITY FUND (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of National Social Security Fund dated the 17th January, 2006 in the matter of Tender No. NSSF 03/2005-2006 for completion of the Social Security House Annexe Parking Silo on plot No. L.R. No. 209/11297, Nairobi.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Ms. Phyllis Nganga	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information in all documents before it, the Board decides as follows: -

BACKGROUND

This tender for the completion of the Social Security House Annex Parking Silo was advertised by the National Social Security Fund, hereinafter referred to as NSSF, on 11th November, 2005 in the Daily Nation and East African Standard newspapers. The tender comprised of the following work:-

- Main Contract, Builder's Completion Works
- Mechanical Ventilation Works
- Plumbing and Drainage installations
- Fire Fighting Installations
- Electrical Installations and Associated Services
- Lifts Installations
- Generator Installations

The tenders were closed/opened on 9th December, 2005 at 11:00 a.m. in the presence of representatives of the tenderers who chose to attend. Five (5) tenders were opened for the Main Works Category, which is the subject of this appeal. The tenderers bid price and bid bond were read out aloud and were as follows:

Bidder No.	Bidder's Name	Bid Sum (Kshs)	Bid Bond (Kshs)
1.	Hari – Cons (Kenya) Ltd	553,475,531	11,000,000
2.	Seyani Brothers & Co (K) Ltd.	603,883,292	-
3.	Dimken (K) Ltd.	531,857,204	10,418,182
4.	N. K. Brothers Ltd.	499,909,101	10,418,182
5.	China Jiangsu	558,344,497	11,200,000

EVALUATION

The tender was evaluated in four stages as follows:

STAGE I - RESPONSIVENESS

The Evaluation Committee checked whether the tenderers complied with the mandatory requirements set out in the tender advertisement notice and tender documents. The results were as illustrated in the table below: -

Bid No.	Bidder's Name	NSSF Compl.	NHIF Compl	Tax Compl.	Director Details	Audited Accounts	Company Registration	Business Permit	Bid Bond	Power of attorney	Remarks
1.	Hari Cons (K) Ltd	√	√	√	√	√	√	√	√	X	Not Qualified
2.	Seyani Brothers	√	√	X	√	√	√	√	X	N/A	Not Qualified
3.	Dimken (K) Ltd	√	√	√	√	√	√	X	√	N/A	Not Qualified
4.	N.K. Brothers ltd	√	√	√	√	√	√	√	√	N/A	Qualified
5.	China Jiangsu International	√	√	√	√	√	√	√	√	N/A	Qualified

Bidder No. 1 was eliminated for lack of a power of Attorney. It submitted a joint venture bid with Tarrazo Enterprises Ltd but had enclosed a secrecy agreement, which could not be a substitute for the power of attorney as required under Clause 2.6 on Qualification Information in the tender documents. The second bidder Seyani Brothers was eliminated for lack of a bid bond and a tax compliance certificate. It had submitted a copy of its bid bond and not the original. The third bidder, Dimken (K) Ltd had not submitted its business permit. This left two bidders N. K Brothers and China Jiangsu International Economic Corporation, hereinafter referred to as China Jiangsu, to proceed to the technical evaluation.

STAGE II - TECHNICAL EVALUATION

The Evaluation Committee was guided by the criteria set forth in the tender document to check on the bidders responsiveness to the technical requirements. The cut off mark was 75%. The summary of the technical evaluation was as follows: -

NO.	TECHNICAL REQUIREMENT	MAX. SCORE	N. K. BROTHERS LTD	CHINA JIANGSU
A	Document fully completed/ compliance with pricing instructions	10	9	9
B	Personnel (Contract Manager, Assistant Site Managers, Supervisors and certified CV's)	15	0	13
C	Relevant Experience {includes years of experience in the industry, volume and value of works carried out, current contracts and names and addresses (references) of clients}	20	17.6	19
D	Machinery and Equipment (includes proof of ownership/lease agreements)	20	18	19

	of machinery necessary for the job)			
E	Business support {includes insurance covers for both staff and Equipment, financial stability, access to lines of credit, liquidity ratio as well as presence of legal advisors and appointed bankers)	20	17	19
F	At least 3 referees (letters attached)	5	5	2
G	Completion programme for the works {shortest period earns maximum points. Other periods prorated}	10	10	7.4
	TOTAL	100	76.6	88.4

The two tenderers qualified for the next stage of evaluation as both passed the cut off mark of 75 %.

STAGE III – FINANCIAL EVALUATION

The Evaluation Committee compared the prices of the two qualified bidders and that of N. K. Brothers Ltd emerged the lowest price at Kshs. 499,909,101.00 while that of China Jiangsu was Kshs. 558, 344,497.00. The estimated cost for the works by the Procuring Entity was Kshs. 471, 588,927.00

The tender of N. K. Brothers Ltd had no errors and its rates were consistent. The tender of China Jiangsu had an error of 5% (Kshs. 27,976,885.00) and if this error was taken into account, its price would have been Kshs. 586,321,382.00. The rates in the China Jiangsu tender were also consistent.

STAGE IV - RECOMMENDATION

The Evaluation Committee observed that though N. K. Brothers Ltd were the lowest evaluated bidder, the NSSF had an experience with the bidder on the same project where the bidder was awarded the tender for the construction of the parking silo but the NSSF determined its employment due to failure to complete the project. Taking into consideration the previous failure to complete the project, the Evaluation Committee recommended against the award to N. K. Brothers Ltd and that the contract be awarded to China Jiangsu at a negotiated price of Kshs. 499,909,101.00, being the price quoted by the Applicant.

TENDER AWARD

The Tender Committee of the NSSF approved the recommendation of the Evaluation Committee on 17th January, 2006 that the tender for the completion of the Parking Silo be awarded to China Jiangsu at a negotiated price of Kshs. 499,909,101.00 which compared well with the in-house estimated cost of the works of Kshs. 471,588,927.00

THE APPEAL

This appeal against the award by the Tender Committee of NSSF was lodged by N. K. Brothers on 27th January, 2006. The Applicant was represented by Anthony M. Lubulelah, advocate, together with Khoda Pravin, Rajesh Dratha, Stephen Waweru, Wilfred A. Mutubwa, Advocate and Daniella Adalla, Advocate. The Procuring Entity was represented by Githiri Njehia, Said Chitembwe, A. Odero, A. W. Mbogo and Andersson S. N. Ndwiga. China Jiangsu was represented by Lily Lin.

The appeal was based on 14 grounds. Nine grounds of the appeal namely, (a) – (h) and (j) were admitted by the Procuring Entity and therefore were not in contention. They were statements on the tendering process and were not allegations of any breach of the Regulations as required by Regulation 42 (2). We now deal with the five grounds in contention as follows:-

Ground (i)

The Applicant alleged that the Procuring Entity breached Regulation 11 which bars discriminatory exclusion from participating in a tender. It argued that its bid was eliminated as a result of extraneous matters not disclosed to the parties although its bid was the most cost effective. It further informed the Board that the tender was a re- advertisement of a previous contract, which was terminated and that it was the previous contractor of the works but could not perform the contract as was expected due to some contractual difficulties encountered. It further stated that in the course of excavation during the previous contract, it had encountered extraordinarily hard rock that was difficult and time consuming to excavate manually or mechanically as required by the contract. It had therefore outsourced the services of a specialist excavation company from South Africa who were also unable to excavate the rock. The difficult rock excavation led to the delay in the completion of the works. The Applicant applied for an extension of time which was not granted by the Procuring Entity. The Applicant further asserted that it was entitled to pursue its contractual rights through litigation for wrongful termination but it chose not to do so in order to maintain a good relationship with the Procuring Entity and also safeguard its reputation in the construction industry.

The Applicant submitted that the Procuring Entity accepted its tender and did not bar it from participating thus indicating that the Procuring Entity was willing to turn a fresh page with regard to the new tender. It argued that the Procuring Entity was estopped by its own conduct, by allowing it to participate in the tender. It could not therefore bar the Applicant from participating in the tender at the evaluation stage. The Applicant further contended that in the tender advertisement, no mention was made that the previous performance will be used as an evaluation criteria. The Procuring Entity therefore discriminated against the Applicant by using this extraneous criteria to deny it the tender contrary to Regulation 13(3) and 30 (7).

The Applicant further submitted that the Procuring Entity did not check the performance of other bidders yet it purported to have enquired on the Applicant's past performance, which was discriminatory. In addition, when one's reputation is in contention, it is expected that one should be given a chance to defend oneself as required under the rules of natural justice. The Applicant further submitted that the bidder with the highest tender price and longest construction period was awarded the tender contrary to the spirit and intention of the Regulations, which are to promote economy and efficiency in public procurement.

In its response, the Procuring Entity disputed the aforesaid allegations stating that the Applicant's bid was accepted and evaluated. Its bid was however eliminated on the basis of its past performance as provided for in Regulation 13 (1) (a) that allowed for evaluation of the bidder's reputation amongst other criteria.

After evaluation of the tender, the Procuring Entity was not able to award the contract to the Applicant on the strength of a reference letter received from National Hospital Insurance Fund (NHIF) which indicated that their performance on a similar project was not satisfactory. The Procuring Entity further stated that, as its previous contractor on the same works, the Applicant had not performed satisfactorily leading to the termination of the contract due to slow progress of the works. The Applicant had requested for extra payment of Kshs. 518,697,227.00 for excavating the hard rock on site, which was not accepted as the specifications in the tender documents had clearly indicated that the hardest type of rock, i.e. type A, was to be excavated and all bidders were aware of this fact prior to tendering. At the time of contract termination, the Applicant had been paid Kshs. 379, 396, 541.60 for work done which included the excavation of all the rock.

The Board notes that the Applicant participated in the tendering process and its tender was evaluated. The Applicant was therefore not discriminated against contrary to Regulation 11, which stipulates that candidates shall not be excluded from participation in Public Procurement on the basis on nationality, race or any other criteria not having to do with their qualifications.

However, the Board notes that the previous performance of bidders was not indicated as a criteria for tender evaluation. This criteria was only used on the Applicant. In the Board's view this was discriminatory and in breach of Regulations 13 (3) and 30 (7). The Procuring Entity relied only on the letter from the NHIF and did not seek further references from other referees provided in the tender document of the Applicant. The letter from the NHIF did not provide adequate details for one to make an impartial and

informed judgement on why the Applicant performed below par on the ongoing car park project. We have noted from the recommendation letters of the Chief Architect of the Ministry of Roads and Public Works, several Consultants and Developers contained in the tender document of the Applicant that the Applicant had either successfully completed or was still working on several major building projects since 1997. These projects include UAP Headquarters, Medicare Center for the NHIF, Headquarters Building for Commercial Bank of Africa and Conversion of Existing Income Tax House to Law Courts which costed Kshs.349,692,159.00, Kshs.1,800,000,000.00, Kshs. 453,250,000.00 and Kshs. 696, 101, 909.00 respectively. The tendered cost of the multi-storey Car Park for the NHIF currently being constructed by the Applicant was Kshs. 909,709,300.00.

The Board notes that an interested candidate, M/s Hari-Cons (K) Ltd informed it through its arguments and information that the Applicant was the lowest both price wise and in period of completion of the works. In addition, the Applicant should be awarded the contract since it has a good reputation in the market.

Taking into account that the Applicant was subjected to a criteria not specified in the tender document and not applied to the other tenderer, the Board finds that Regulations 13(3) and 30 (7) were breached.

Consequently this ground of appeal succeeds.

GROUND K

In this ground of appeal the Applicant argued that the Procuring Entity breached Regulation 12 by communicating with the successful candidate by

means other than in writing and failed to communicate with it. The Procuring Entity awarded the tender to China Jiangsu at a price that it had not quoted. This would only mean that it had communicated with the successful bidder prior to notification of award, as it could not do so knowing that China Jiangsu's award was not based on their offer.

The Applicant further argued that the Procuring Entity's action of awarding China Jiangsu the tender at the Applicant's price, amounted to fraud on the Procuring Entity's part. If this was allowed, it would render the public procurement procedures set out in the Regulations to be of no consequence.

In its response, the Procuring Entity submitted that it had not communicated with any bidder in any other form other than its letters of notification to all the tenderers dated 18th January, 2006. It further submitted that it awarded the tender to China Jiangsu at the price of the Applicant in the belief that it would negotiate the tender based on the post award Clause No. 26 (iii) in the Public Procurement User's Guide. On the construction period, the Procuring Entity stated that they did not change the construction period of 80 weeks quoted by China Jiangsu since it was within their estimated completion period of 72 weeks.

During the hearing, there was no evidence adduced by the Applicant on other forms of communication with the successful bidder other than the notification letter. On this limb of the argument, the Applicant did not submit proof of other of communication. Accordingly there was no breach of Regulation 12 as alleged by the Applicant.

On the issue on the post award negotiations on price, the Board notes that this is prohibited under Regulation 32 which states that, " a tenderer shall not be required, as a condition for award, to undertake responsibilities not stipulated in the tender documents, to change its price or otherwise to modify its tender". At the hearing, China Jiangsu confirmed that they had not accepted the offered sum of Kshs. 499, 909, 101.00 and they were only willing to give a discount of 5% on their tender. It further asserted that it was a competent firm that was able to perform the contract.

We have further noted that the construction period was not stipulated in the letter of award. In construction projects, both the construction cost and period are critical when determining an award. We therefore hold that the offer, which was made to China Jiangsu, was indeterminate both in cost and in duration.

Further, the awarding of the tender to China Jiangsu at the price of the Applicant was irregular and contrary to Regulation 32. The negotiation that the Procuring Entity intended to enter into with the successful bidder is also not provided for in the Public Procurement Regulations. On this limb, the ground of appeal succeeds.

GROUND L, M AND N

On these grounds, the Applicant submitted that it would suffer loss amounting to 20% of its bid sum of Kshs.499, 909,101. Further that its reputation would suffer greatly.

The Procuring Entity submitted that though the Applicant was the lowest bidder price-wise, it was not awarded the tender on the basis of its

reputation as provided for in Regulation 13(1)(a). Further, the tendering process was a competitive process and winning or losing was not based on price and completion period only.

The Board notes that these two grounds are statements of perceived losses and damages arising from anticipated profit, which the Applicant would have made if it were awarded the tender. The tendering process is a business risk. Further, in open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

Finally, the Board has made the following observations on the tendering process: -

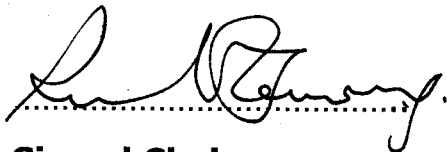
1. The Procuring Entity only sought recommendations on the present performance of the Applicant and did not do the same for the successful bidder. This showed that it did not use the same criteria to assess the present performance of all bidders to come to a justified conclusion of its findings. The Procuring Entity did not also take into account the positive recommendations of the listed performance of the Applicant contained in its tender document.
2. China Jiangsu submitted its offer on an extract of the Bills of Quantities and not on the Tender Form. This offer did not comply

with the conditions of the tender and therefore did not constitute a proper binding offer.

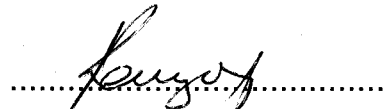
3. The previous contract between the Procuring Entity and the Applicant regarding the construction of the subject matter of the tender, ran into contractual difficulties leading to termination. There remain unresolved outstanding issues on that contract which require to be resolved one way or another.

Taking all the above matters in consideration, the appeal succeeds and the award of the tender to China Jiangsu is hereby annulled. In the circumstances, we hereby order that the tender be re-tendered.

Dated at Nairobi on this 1st day of March, 2006



Signed Chairman



Signed Secretary